ISYODA (M) SDN BHD

v.

LOW SEONG TEK

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[ORIGINATING SUMMONS NO: D2-24-92-1999]
12 JUNE 2000

CIVIL PROCEDURE: *Mode of commencement - Originating summons - Injunction to prevent commission of a tort - Whether must proceed by way of writ - Whether may proceed by way of originating summons since tort not yet committed - Rules of the High Court 1980, O. 5 r. 2(a)*

COMPANY LAW: *Winding up - Injunction to restrain petition - Whether court has jurisdiction to restrain presentation of winding up petition on basis of preventing abuse of process of court - Whether presentation of petition can still be restrained if three weeks have passed without settlement of debt - Whether injunction to restrain petition may be applied for even before petition presented - Companies Act 1965, s. 218(2)(a)*

CIVIL PROCEDURE: *Mode of commencement - Originating summons - Particulars identifying cause of action - Whether must be included in originating summons - Whether sufficient to include particulars in affidavit in support - Whether originating summons not including sufficient particulars ought to be dismissed - Rules of the High Court 1980, O. 7 r. 3(1)*

The plaintiff applied by way of originating summons for an order to restrain the defendant from filing any application to wind up the plaintiff company based on a demand issued by the defendant under s. 218(2)(a) of the Companies Act 1965 ('the Act'). No affidavit in support was filed together with the originating summons and the originating summons itself did not state on what basis the plaintiff was seeking to restrain the defendant. Subsequently, an affidavit in support was filed and the ground for the order sought, as stated therein, was that the intended winding up petition would be an abuse of the process of the court because the amount claimed by the defendant was a disputed debt for which no judgment had been obtained.

The defendant responded by filing an application for an order that the originating summons be struck out or dismissed. The senior assistant registrar dismissed the defendant's application and hence this appeal. The grounds relied on by the defendant, *inter alia*, were: (i) as the injunction sought by the plaintiff was a relief for the alleged tort of making an unjust claim, O. 5 r. 2(a) of the Rules of the High Court 1980 ('the Rules') required the proceedings for such a relief to be begun by writ; (ii) even if the defendant's proposed winding up petition could be an abuse of process, the abuse of process would only arise in the context of a petition that has been presented but no such petition was presented in the instant case; (iii) no injunction could be granted to restrain the presentation of a winding up petition once the period of 21 days for settlement prescribed by s. 218(2)(a) of the Act had expired; and (iv) pursuant to O. 7 r. 3(1) of the Rules, it was fatal to omit to include in the originating summons sufficient particulars to identify the cause of action in respect of which the plaintiff claimed the relief of an injunction.

Held:

[1] The plaintiff's action was directed against the act that the defendant threatened by the statutory demand to do, *ie* to present a winding up petition, but has not yet done. If the presentation of a winding up petition when the debt is *bona fide* disputed is a tort, the tort has not been committed yet. What the plaintiff was seeking to do was to prevent the commission of the tort. Order 5 r. 2(a) of the Rules applies to a tort that is alleged to have been committed and it therefore did not apply to the proceedings here. Thus, the proceedings did not have to be begun by writ. It could be begun by originating summons.

[2] The court has jurisdiction to restrain the presentation of a winding up petition on the basis of preventing an abuse of the process of the court.

[3] If a demand is not settled within three weeks, the creditor is technically able to present a winding up petition because the company is, according to s. 218(2)(a) of the Act, deemed to be unable to pay its debt. But fundamental to the deeming is the question whether the would be petitioner is a creditor. So long as the debt is *bona fide* disputed, his status as a creditor is not established. That is why even after the petition is presented, the advertisement of it or further proceedings on it may be restrained if it is shown that the debt is *bona fide* disputed. Since the prosecution of a petition that has been presented may be restrained on that ground, it is illogical to say that the presentation of a petition cannot be restrained once the three weeks have passed

without settlement by the company because then the creditor is entitled to present a petition. It is prudent to apply for an injunction within the three weeks because the creditor may present his petition as soon as the period ends. But so long as no petition has been presented, its presentation may clearly be restrained.

[4] An originating summons that does not comply with O. 7 r. 3(1) of the Rules because it does not include sufficient particulars to identify the cause of action must be dismissed. Where an injunction is sought by originating summons to restrain a certain act but the originating summons does not show why the act should be restrained, even though the affidavit in support does, then the originating summons has not included sufficient particulars to identify the cause of action in respect of which the plaintiff claims the relief of the injunction. In the present case, the originating summons did not contain sufficient particulars to identify the cause of action because it did not state why the defendant should be restrained from applying to wind up the plaintiff company.

[Appeal allowed; originating summons dismissed with costs.]

Case(s) referred to:
Cadiz Waterworks Company v. Barnett [1874] LR. 19 Eq 182 ***(refd)***
Cornhill Insurance Plc v. Improvement Services Ltd & Ors [1986] 1 WLR 114 ***(refd)***
Kon Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd [1998] 5 CLJ 310 ***(dist)***
Mann v. Goldstein [1968] 2 All ER 769 ***(refd)***
Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 218(2)(a)
Rules of the High Court 1980, O. 5 r. 2(a)

Other source(s) referred to:
Atkins, vol 10, 1992, 2nd edn, Form 86

For the plaintiff - Chang Wei Mun; M/s Raja, Darryl & Loh
For the defendant - Amarjeet Singh; M/s Zubeda & Amarjeet

Reported by S Dharmendran

JUDGMENT

Abdul Aziz Mohamad J:

By their originating summons in this case, filed on 17 March 1999, the plaintiff company seeks an order to restrain the defendant from filing any application to wind up the plaintiff company based on a demand in writing

dated 19 February 1999 issued by the defendant under s. 218(2)(a) of the Companies Act 1965. The injunctive relief sought was a substantive relief and not an interlocutory relief under the Rules of the High Court 1980. No affidavit in support of the originating summons was filed together with it. The originating summons itself does not state the basis on which, or the reasons for which, or the justification with which, the plaintiffs seek to so restrain the defendant.

On 25 March 1999 the defendant filed his application for an order that the originating summons be struck out or dismissed.

It was only on 31 March that the plaintiffs filed their affidavit in support of their originating summons and it is only from that affidavit that one learns that the ground for the order sought by the plaintiffs is that the intended winding-up petition would be an abuse of the process of the court because the amount claimed by the defendant is a disputed debt for which no judgment has been obtained.

The learned Senior Assistant Registrar dismissed the defendant's application. He now appeals.

Before me, learned counsel for the defendant raised four grounds for dismissing or striking out the originating summons. I propose to deal only with three grounds. The ground about the intitulement is, I think, weak and unimportant and I would not dismiss or strike out the originating summons solely on that ground, which I think does not deserve serious consideration.

Learned counsel for the defendant does not deny that it is possible in law to obtain an injunction to restrain the presentation of a winding-up petition where the debt claimed is, *bona fide* disputed. Such injunctions have been granted since *Cadiz Waterworks Company v. Barnett* [1874] L.R. 19 Eq. 182. But learned counsel says that it cannot be sought in the manner employed in this case, that is, by originating summons. He contends that it should be sought by way of a writ because the injunction sought by the plaintiffs is a relief for a tort and O. 5 r. 2(a) of the Rules of the High Court 1980 requires proceedings for such a relief to be begun by writ. (Incidentally, *Cadiz Waterworks* was brought on a motion, not by way of a writ). It is not clear what the tort is that learned counsel considers that the plaintiffs regard the defendant to have committed. It would appear to be the making of the statutory demand, which to the plaintiffs is an unjust claim because it is *bona fide* disputed. He argues that making an unjust claim is tortious. Learned counsel for the defendant, on the other hand, submits that the plaintiffs' cause of action in the originating summons is

abuse of process. Learned counsel for the defendant argues that the process, meaning the winding-up petition, has not been launched and that in the authorities abuse of process is mentioned in the context of a petition that has been presented and therefore the power of the court to restrain abuse of process can only be exercised in winding-up proceedings.

I think the answer to the controversy lies in looking at what the plaintiffs are seeking by their originating summons in order to see whether the proceedings come within the intention of O. 5 r. 2(a). The plaintiffs' action is not directed against the statutory demand, although it was prompted by the statutory demand. It is directed against the act that the defendant threatened by the statutory demand to do, that is to present a winding-up petition, but has not yet done. If the presentation of a winding-up petition when the debt is *bona fide* disputed is a tort, the tort has not been committed, and what the plaintiffs are seeking to do is to prevent the commission of the tort. O. 5 r. 2(a) speaks of "proceedings in which a claim is made by the plaintiff for any relief or remedy for any tort, other than trespass to land". In my opinion, that provision applies to a tort that is alleged to have been committed and it therefore does not apply to the proceedings here and they do not have to be begun by writ. They may be begun by originating summons, as O. 5 r. 4(1) says. In England, an application to restrain the presentation of a winding-up petition is now made by originating application. See *Atkins*, Vol. 10 (1992), Second Edn, Form 86.

There is really no necessity to consider whether the plaintiffs' cause of action is abuse of process. It clearly is. 1 will only dispose of learned counsel for the defendant's argument that abuse of process only arises in the context of a petition that has been presented by citing a passage from *Mann v. Goldstein* [1968] 2 All ER 769 at p. 771:

> It is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process (see, for example, *Re A Company* [18941 2 Ch. 349).

Whether it is to restrain the presentation of a winding-up petition, or to restrain the advertising of a petition that has been presented or to restrain further proceedings on it, the basis is to prevent an abuse of the process of the court.

For completeness, I should say that, in *Mann v. Goldstein*, Ungoed-Thomas J, further on in his judgment, reverted to the passage that I have quoted in order to explain what is the legitimate purpose of a winding-up petition. He said at p. 775:

> So I return to what was mentioned earlier in this judgment, that it is an abuse of the process of the court to prosecute a winding-up application otherwise than in accordance with the legitimate purpose of such a process. The legitimate purpose of such a process is to wind-up a company on a ground specified in the Companies Act, 1948, which, so far as material to this case, is the ground that it is unable to pay its debts. It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because s. 224 makes it a prerequisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.

Another ground advanced by learned counsel for the defendant is that no injunction can be granted to restrain the presentation of a winding-up petition once the period of twenty-one days for settlement prescribed by s. 218(2)(a) has expired. The authority relied on for that proposition is the following statement of Abdul Malik Ishak J in *Kon Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd* [1998] 6 MLJ 330 at p. 339 C-D:

> In my judgment, under s. 218(2)(a) of the Companies Act 1965 if a debtor does not pay within three weeks (21 days) of service of a notice, the creditor is entitled to present a petition and that creditor cannot be restrained by an injunction. At this stage, the debtor cannot say that it is able to pay but chooses not to: *Cornhill Insurance Plc v. Improvement Services Ltd & Ors* [1986] 1 WLR 114.

It is of course true that if the demand is not settled within the three weeks the creditor is entitled to present a winding-up petition and that is because the company is then, according to s. 218(2)(a), deemed to be unable to pay its debt. But fundamental to the deeming is the question whether the would-be petitioner is a creditor and so long as the debt is *bona fide* disputed his status as a creditor is not established. That is why, even after the petition is presented, the advertisement of it or further proceedings on it may be restrained if it is shown that the debt is *bona fide* disputed. Since the prosecution of a petition that has been presented may be restrained on that ground, it is, I say with respect, illogical to say that the presentation of a petition cannot be restrained once the three weeks have passed without settlement by the company because then the creditor is entitled to present a petition. Actually I think the word "entitled" is rather

strong and may be misleading. I like the neutral term used by Harman J in *Cornhill Insurance*, the case relied on by Abdul Malik Ishak J for the statement that I have quoted. It is "technically able".

It is prudent to apply for and endeavour to obtain an injunction within the three weeks because the creditor might present his petition just as soon as the period ends. But so long as no petition has been presented, its presentation may, clearly in my opinion, be restrained.

Nowhere in *Cornhill Insurance* did Harman J say that the presentation of the petition cannot be restrained after the three weeks have passed. The point about the twenty-one days is mentioned at p. 116G, where the words "technically able" are to be found. What happened was that the period was to expire on a Monday and the petition could be presented any time on Monday morning before any application to restrain the presentation could be made that morning. Harmon J, I think, was merely explaining why the company had to make their *ex parte* application at 3pm of the Friday before that Monday. The point about the twenty-one days did not go beyond that.

The remaining ground on which the defendant bases his application is that the originating summons does not include "sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims" the relief of an injunction, which O. 7 r. 3(1) of the Rules of the High Court 1980 says every originating summons "must include".

In *Saraswathy Devi a/p Nadchatiram v. Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89, the plaintiff (the respondent in the appeal) had, by originating summons, applied for an order to enjoin the defendant Saraswathy Devi, an advocate and solicitor, from acting for certain persons in certain proceedings but the originating summons did not show why the defendant should not act for those persons in those proceedings, although the affidavit in support of the originating summons did. The Court of Appeal nevertheless ruled at p. 952 that because of the said omission in the originating summons no cause of action was shown in it and that on that ground alone the originating summons ought to have been dismissed by the judge below.

It is clear from the ruling that an originating summons that does not comply with O. 7 r. 3(1) because it does not include sufficient particulars to identify the cause of action must be dismissed. It is also clear that where an injunction is sought by originating summons to restrain a certain act but the originating summons does not show why the act should be restrained,

even though the affidavit in support does, then the originating summons has not included sufficient particulars to identify the cause of action in respect of which the plaintiff claims the relief of the injunction.

In the present case, the originating summons does not contain sufficient particulars to identify the cause of action because it does not state why the defendant should be restrained from applying for a winding-up of the plaintiff company. Applying the ruling of the Court of Appeal, by which I am bound, I have to dismiss the originating summons.

Learned counsel for the plaintiffs submits that the cause of action ought to be presumed as a matter of law, that is to say, that when an application is made to restrain the bringing of winding-up proceedings based on a demand under s. 218(2)(a), it must be on the ground of abuse of process of court because the debt is *bona fide* disputed. I do not think that such a presumption is justified. There could be some other ground. In any case, O. 7 r. 3(1) must be construed as requiring particulars identifying the cause of action to be expressly included.

I have been most reluctant to uphold this ground and dismiss or strike out the originating summons on this ground because although the originating summons lacks particulars to identify the cause of action, the cause of action is easily identifiable from the affidavit in support of the application. But there is the requirement of O. 7 r. 3(1) and the strict ruling in *Saraswathy Devi* which I think applies to the circumstances of the originating summons in this case, and I am bound by the ruling and the defendant is entitled to expect me to act according to the ruling. For that reason I have to dismiss the originating summons, which I do with costs.

Learned counsel for the plaintiffs has pleaded that they be given leave to amend the originating summons *in lieu* of its being dismissed. But I think it is too late to consider an amendment because, after the defendant filed his application to dismiss or strike out, the plaintiffs did file a formal application to amend the originating summons suitably but, before the defendant's application was heard, they thought fit to withdraw the amendment application.